

**IN THE SUPREME COURT OF BELIZE, A.D. 2020
CRIMINAL JURISDICTION**

SOUTHERN DISTRICT

Indictment No. S3/2017

THE QUEEN

V

SANTA SHOL	FIRST ACCUSED
ZITA SHOL	SECOND ACCUSED
ALBERT CANTI	THIRD ACCUSED
WILHELM GARBUTT JR.	FOURTH ACCUSED

BEFORE: Honourable Justice Mr. Francis M. Cumberbatch

APPEARANCES: Mr. Javier Chan – Counsel for the Crown
Mr. Arthur Saldivar – Counsel for the Defendants

TRIAL DATES: 17th, 18th, 19th, 23rd, 24th 26th, July, 2018
18th September, 2018
4th and 8th, October, 2018

JUDGMENT ON SENTENCING

[1] The Accused were indicted by the Director of Public Prosecutions for the following offences, to wit, causing harm and abetment of rape against the First and Second Accused; abetment of rape against the Third Accused; and rape against the Fourth Accused. After a fully contested trial, they were all

convicted by a jury on the 26th day of July, 2018, for the offences in the Indictment.

The Facts

- [2] On the 30th day of August, 2015, at around 5:00 p.m., the victim was walking along the Southern Highway in the vicinity of Indian Creek Village in company with friends. They were accosted by the Third Accused who commenced a verbal altercation with the victim and her friends. He was joined by the First and Second Accused who proceeded to beat the victim and whilst doing so, the First and Second Accused shouted to the Fourth Accused, "Rape her! Rape her!". The Third Accused held her by her hands and shoulders to facilitate the Fourth Accused efforts to rape the victim. The Fourth Accused raped the victim after which she was left in the bush with her blouse and bra torn off of her and bearing bodily injuries.
- [3] The victim was examined by a medical practitioner who recorded his findings on the medico legal form. These findings included multiple superficial injuries to the body and post coital bleeding in the vagina. The doctor who testified stated that post coital bleeding means bleeding in the walls of the vagina after sexual intercourse.

The Hearing

[4] The Court held a sentencing hearing and the convicted persons called one character witness. That witness testified that he was related to all of the convicted persons and that they were honest and hardworking persons. He also asked the Court to exercise leniency with them. The convicted persons addressed the Court in mitigation. I shall return to these addresses later in this judgment.

THE CASE AGAINST SANTA SHOL AND ZITA SHOL

[5] These two convicted persons initiated the physical attack on the victim. Whilst beating the victim she fell to the ground and was eventually dragged into the bush some five feet off the highway. They proceeded to cry “Rape her! Rape her!” The evidence discloses that the victim was brutally raped by the Fourth Accused as is evidenced in the medical evidence aforesaid. They are convicted for the offences of causing harm and abetment of rape aforesaid.

[6] I find the following to be the aggravating and mitigating factors herein:

[7] Aggravating Factors

- i. The gravity of the offences;
- ii. The joint physical attack on the victim who was defenseless;
- iii. The offence of causing harm was planned and premeditated;

iv. The heinousness of the offence abetted by them.

[8] **Mitigating Factors**

- i. The hitherto clean criminal records of both convicted persons;
- ii. The remorse expressed;
- iii. They have taken full responsibility for their actions.

THE CASE AGAINST ALBERT CANTI

[9] The evidence discloses that whilst the victim and her friends were walking along the highway this convicted person approached them riding a bicycle and addressed them in a hostile manner. He struck one of her friends and indulged in hostile behaviour towards the victim referring to her and her friends as assholes and threatening to beat her. He was joined by the First and Second Accused who proceeded to beat the victim. This Accused held the victim by her hands and shoulders to enable the Fourth to remove her clothing and eventually rape her.

[10] The aggravating and mitigating factors are as follows:

[11] **Aggravating Factors**

- i. The seriousness of the offence;
- ii. This Accused planned, premeditated, and initiated the attack on the victim and her friends;

iii. The nature and extent of his actions to assist in the brutal rape of the victim.

[12] **Mitigating Factors**

- i. The remorse expressed;
- ii. The Accused has taken full responsibility for his actions.

THE CASE AGAINST WILHELM GARBUTT JR.

[13] In my consideration of the case against this Accused, I will apply the classical principles of sentencing, namely retribution, deterrence, prevention and rehabilitation.

Retribution

[14] This Accused person has been convicted of the offence of rape, which saves for homicide, is considered to be the most heinous offence committed against a woman. The victim was attacked and brutally raped in broad daylight, in public, and in the presence of a crowd of some 20 persons including children. This occurred in the bush about five feet from the edge of the roadway. The evidence further discloses that when the victim was rescued by one Petrona Pop she was half naked without a bra and her blouse was torn up and there was a crowd present.

[15] The injuries to the victim's vaginal walls are a silent testimony of the brutality of her violation whilst the presence of people at the crime scene exacerbates the shame and humiliation experienced by her.

[16] It is incumbent on this Court to impose a suitable sentence that commensurate with the gravity of the offence.

Deterrence

[17] Sexual offences are prevalent in this jurisdiction. This principle is applicable to deter those persons who have committed this heinous offence from being repeat offenders and for those in the wider society who may be contemplating the commission of this offence.

[18] Thus, the Court must impose a suitable sentence to achieve the aims of this principle.

Prevention

[19] This principle concerns those persons who by their criminal conduct are considered to be a danger to society. Notwithstanding the gravity of this offence, there is no evidence before me to cause me to conclude that the Accused is to be considered a danger to society, hence, the need for the imposition of an indeterminate or similarly draconian sentence.

Accordingly, this principle will not be applied here.

Rehabilitation

[20] This Court holds the view that the rehabilitation of the offender to ensure a smooth reintegration into society is of paramount importance. I find that this process may be hampered by the attitude of the Accused who is unremorseful and has not taken responsibility for his actions. Nevertheless, he seeks leniency from the Court.

[21] I find in the circumstances, the Accused rehabilitation would be long and arduous and be best done within the confines of a penal institution.

[22] The following are the aggravating and mitigating factors:

[23] Aggravating Factors

- i. The heinousness of this offence;
- ii. The offence was committed in daylight hours;
- iii. The offence was committed in public and in the presence of other persons;
- iv. The convicted person has not expressed any remorse;
- v. The physical and psychological trauma caused to the victim;
- vi. The humiliation experienced by the victim on being sexually violated in public during daylight hours.

[24] Mitigating Factors

- i. I do not find any mitigating factors in the convicted person's favour.

The Law

[25] The First and Second Accused are convicted for the offences of causing harm contrary to Section 79 of the Criminal Code. They are also convicted for the offence of abetment of rape contrary to Sections 20 and 46 of the Criminal Code. The Third Accused is also convicted for the offence of abetment of rape whilst the Fourth Accused is convicted for the offence of rape.

[26] Section 79 of the Criminal Code provides a maximum sentence of one year's imprisonment for anyone convicted of this offence.

[27] Section 20(4) of the Code provides thus:

“(4). Every person who abets a crime shall be punishable on indictment or summary conviction, according as he would be would be punishable for committing that crime.”

[28] Section 46 of the Criminal Code provides thus:

“(46). Every person who commits rape or marital rape shall on conviction on indictment be imprisoned for a term which shall not be less than 8 years but which may extend to imprisonment for life.”

[29] The mandatory minimum sentence of eight years imprisonment for the offence of rape may be reduced pursuant to the provisions of *Section 160 of*

the Indictable Procedure Act as amended by the Indictable Procedure

(Amendment) Act 2017 to wit:

“160 (1). Where any person is convicted of a crime punishable by a mandatory minimum term of imprisonment under the Code or any other enactment, the Court may, if it considers that the justice of the case so requires, having regard to special reasons which must be recorded in writing, exercise its discretion to sentence the person to a term of imprisonment, as the case may be, less than the mandatory minimum term prescribed for the crime for the Code or other enactment, as the case may be.

(2). Notwithstanding the provisions of this section, the Court may not sentence an offender who is 18 years of age or over, to less than the prescribed mandatory minimum term, where the crime he has been convicted of is,

(a) ...

(b) An offence under section 46(rape).....”

Sentence

SHANTA SHOL, ZITA SHOL, ALBERT CANTI

- [30] The Court is obliged to determine appropriate sentences for the three Accused herein. I have carried out a balancing exercise for each of them with the aggravating and mitigating factors and find that the aggravating factors outweigh the mitigating ones.
- [31] The Court heard from one Marcus Cal, a character witness who testified that the Accused are honest, hardworking, and well behaved. He continued that as far as he knew they have not had any prior problems with the law. He asked for leniency from the Court.
- [32] Defence Counsel Mr. Saldivar who appeared for the Accused at the sentencing hearing informed the Court that the First and Fourth Accused who live and cohabit in a common-law union are the parents of minor children. These children are currently without the care, support, and guidance of their parents.
- [33] Counsel went on to address the Court on the remorse stated by these Accused persons and their willingness to apologize to the victim for what they have done to her. He urged the Court to impose non-custodial sentences on these convicted persons who are first offenders.

- [34] The Court drew Counsel's attention to the provisions of Section 20(4) of the Criminal Code and invited submissions from both Counsel on that Section and Section 160 of the Indictable Procedure (Amendment) Act 2017.
- [35] Mr. Saldivar submitted, that the facts suggested that the First and Second Accused played a less egregious role than the Third Accused in the events which occurred on that fateful day. He reminded the Court that Santa Shol was a mother with minor children. He submits that these matters constituted 'special reasons' which empowered the Court to impose a lesser sentence than the mandatory minimum sentence of eight years imprisonment.
- [36] He further submitted that although the Second Accused is not a parent she is a first offender and ought to similarly benefit from a reduced sentence.
- [37] Defence Counsel conceded that the Third Accused played an active and involved role by physically restraining the victim to enable the Fourth Accused to have sexual intercourse with her without her consent. However, he submitted that this Accused is a first offender.
- [38] The medico legal form reveals that the victim suffered from multiple superficial injuries after being beaten by the First and Second Accused persons. I find that after taking into account the aggravating and mitigating

factors a custodial sentence for each of these two Accused persons is appropriate.

[39] I will now turn to consider the offence of abetment. There is no statutory definition for what constitutes special reasons. In *R v Wickens (1958) 42 Cr App R 236, 239*, Devlin J referred to four requirements to constitute special reasons, namely,

1. A special reason must be a mitigating or an extenuating circumstance;
2. It must not amount in law to a defence;
3. It must be directly connected with the commission of the offence;
4. It must be a matter which the Court ought properly to take into account when considering sentence.

[40] I will apply this *dictum* in considering the issue of special circumstances. I will also consider the personal circumstances of the Accused and the *dictum* of Conteh JA in the decision of *Davis and Armbrister v Commissioner of Police 2013 1 LRC 213* to wit:

“Sentencing is essentially a judicial function and in the exercise of this function, courts must ensure that in any particular case the sentence should fit the crime and must be in keeping with the principle of proportionality.”

- [41] Defence Counsel relies on the personal circumstances of the First and Second Accused to satisfy the requirement of special circumstances to justify the exercise of the Court's discretion pursuant to the provisions of Section 160 of the Indictable Procedure (Amendment) Act.
- [42] It is trite that most citizens are hardworking and law-abiding until one absurd error of judgment or lack of restraint places them in a position where their freedom is jeopardized. The aforesaid mitigating factors would serve in the usual course of events to justify a substantial reduction in sentence. These factors without more do not constitute special reasons for the exercise of the Court's discretion aforesaid to impose a sentence lower than the mandatory minimum sentence of eight years imprisonment.
- [43] That, however, is not the end of the matter. The Court must go on to consider the proportionality principle aforesaid. Parliament has enacted the minimum sentence of eight years imprisonment for anyone convicted of the act of rape. The involvement of these two Accused though egregious was a far cry from the rape of the victim. Accordingly, a sentence of eight years imprisonment would in my view be wholly disproportionate and excessive. Moreover, I find that it constitutes a breach of Section 7 of the Constitution.
- [44] I find after taking into consideration all the circumstances of this case that the First and Second Accused are sentenced to time served for the offences

of causing harm and abetment of rape. Those sentences will run concurrently.

[45] The case against the Third Accused, however, is quite different. It's likely that without his timely intervention and assistance by physically restraining the victim she may have been able to fight off her attacker and avoid being sexually violated. Here again his actions fall short of the commission of rape. Accordingly, I will apply the proportionality principle and effect a reduction of his sentence.

[46] Accordingly, this convicted person is sentenced to a period of imprisonment of five years. I will however deduct three months from this sentence for the time spent on remand. Thus, the convicted person will spend a period of four years and nine months imprisonment. This sentence commences today the 29th day of October, 2018.

WILHELM GARBUTT JR.

[47] This Accused is convicted for rape. The enormity of this offence has been set out in this judgment. Suffice it to say however that the Accused maintains his innocence and is unrepentant but nevertheless seeks leniency from the Court. What makes his position untenable is that the other Accused who have been convicted for the offence of abetment of rape have all

admitted to their participation in that offence and have tendered apologies to the victim.

[48] I will proceed to consider authorities on sentencing for this offence. The Eastern Caribbean Supreme Court, Court of Appeal in *Winston Joseph et al v Regina* set out guidelines to be followed and applied by a sentencing court in matters involving sexual offences. In addition to guidelines, Sir Dennis Byron suggested examples of aggravating and mitigating factors which The Court should consider whilst sentencing in sexual offences. I find in the case at Bar, some of the aggravating factors suggested by Sir Dennis occur here namely the fact that the victim has suffered physically and physiologically from the sexual assaults.

[49] Sir Dennis at paragraph 17 went on to opine thus:

“The actual sentence impose will depend upon the existence and evaluation of aggravating and mitigating factors, the more common of which I attempt to list below. It is not enough for the Court merely to identify the presence of aggravating and mitigating factors when sentencing. A sentencing court must embark upon an evaluative process. It must weigh the mitigating and aggravating factors. If the aggravating factors are outweighed by the mitigating factors then the tendency must be toward a lower sentence. If however the mitigating

factors are outweighed by the aggravating factors the sentence must tend to go higher.”

[50] In ***R v Christopher Milberry (2003) 2 Cr. App. R. (s) 31 CA Lord Lane*** stated thus:

“Rape is always a serious crime. Other than in wholly exceptional circumstances, it calls for an immediate custodial sentence.... A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Second, to emphasize public disapproval. Third, to serve as a warning to others. Fourth, to punish the offender, and last but by no means least, to protect women (or in this case, young girls). The length of the sentence will depend on all the circumstances. That is a trite observation, but those in cases of rape vary widely from case to case....”

[51] In ***R v Loff James Lennon (1999) 1 Cr App. Rep. (s) 117 Henry LJ*** opined thus:

“It is not the purpose of the judgment to seek to lay down guidelines for sentencing in cases of indecent assault. It is never easy to sentence in such cases. The circumstances of each case will vary greatly....What the judge must do, as I see it, is to tailor the sentence to the particular facts of the case before the Court. In most cases, the

personal circumstances of the offender would normally take second place behind the plain duty of the Court to protect the victims of sexual attacks and to reflect the clear intention of Parliament that offences of this kind should be met with greater severity than may have been the case in former years when the position of the victim may not have been so clearly focused in the public eye.”

[52] I have carried out a balancing exercise with the aggravating and mitigating factors and find that the aggravating factors outweigh the mitigating ones. That being so and having regard to the gravity of the offence a custodial sentence is inevitable. The Court is aware that the Accused is the common-law husband of Santa Shol and is the father of her minor children. I am however, guided by the *dictum* of Henry LJ in ***R v Loff James Lennon*** aforesaid, which is worth repeating here to wit:

“What the judge must do, as I see it, is to tailor the sentence to the particular facts of the case before the Court. In most cases, the personal circumstances of the offender would normally take second place behind the plain duty of the Court to protect the victims of sexual attacks and to reflect the clear intention of Parliament that offences of this kind should be met with greater severity than may

have been the case in former years when the position of the victim may not have been so clearly focused in the public eye.”

[53] I have considered the facts and circumstances of this case. I have also taken into account the personal circumstances of this Accused and the evidence given in his favour by the character witness. The Accused has previous convictions which are not of recent vintage and are for offences other than sexual offences. Thus, I will not take those into consideration against him.

[54] Parliament has enacted a mandatory minimum sentence of eight years imprisonment for anyone convicted of rape. Thus, it is pellucid that the intention of parliament is that this offence must be in the words of Henry LJ met with greater severity than may have been the case in former years.

[55] Accordingly, this convicted person is sentenced to nine years and nine months imprisonment. In determining this sentence, I have taken into account the time spent on remand whilst awaiting sentence. This sentence commences today October 29th 2018.

Dated this Monday 29th day of October, 2018.

Honourable Justice Mr. Francis M. Cumberbatch
Justice of the Supreme Court